In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITIONER'S BRIEF

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OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 202 N. W. 2d 140, and is printed in the Petition for Writ of Certiorari on page 17. The judgment on remittitur of the District Court of North Dakota is printed in the Petition for Writ of Certiorari on page 36.

The order denying the petition for rehearing is printed in the Petition for Writ of Certiorari on page 34.

JURISDICTION

The decision of the Supreme Court of North Dakota, (Petition for Writ of Certiorari, page 32) was entered on October 31, 1972. A timely petition for rehearing was denied on November 29, 1972 (Petition for Writ of Certiorari on page 34), with notice thereof given to petitioner on December 4, 1972. (Petition for Writ of Certiorari, page 38.)

The jurisdiction of the Court is invoked under Title 28, United States Code Annotated, Section 1257.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 43-15-35 (5) North Dakota Century Code:

Requirements for permit to operate pharmacy—The board shall issue a permit to operate a pharmacy, or a renewal permit, upon satisfactory proof that:

5. The applicant for such permit is qualified to conduct the pharmacy, and is a registered pharmacist in good standing or is a partnership, each active member of which is a registered pharmacist in good standing, or a corporation or association, the majority stock in which is owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy; and

The provision of subsection 5 of this section shall not apply to the holder of a permit on July 1, 1963, if otherwise qualified to conduct the pharmacy, provided that any such permit holder who shall discontinue operations under such permit or fail to renew such permit upon expiration shall not thereafter be exempt from

the provisions of such subsection as to such discontinued or lapsed permit. The provisions of subsection 5 of this section shall not apply to hospital pharmacies furnishing service only to patients in such hospital.

The applicable Federal constitutional provision appears in Section 1 of the Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law;"

QUESTIONS PRESENTED

1. Does Section 43-15-35 (5), North Dakota Century Code, violate the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution?

2. Did the North Dakota Supreme Court err in being bound by and following the decision of the United States Supreme Court in *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928)?

3. Should the *Liggett Co.* v. *Baldridge* decision and the decision of the North Dakota Supreme Court in this case be reversed or modified?

STATEMENT

This was an appeal to the Supreme Court of North Dakota from a State District Court decision reversing an administrative agency decision of the North Dakota State Board of Pharmacy, which denied a pharmacy permit to Snyder's Drug Stores, Inc., because it did not comply with the stock ownership requirements of Section 43-15-35 (5) of the North Dakota Century Code.

The application for a pharmacy permit indicated that all of the common stock of Snyder's Drug Stores, Inc., was owned by Red Owl Stores; and that it was not known if any shareholders of Red Owl Stores are or were pharmacists registered and in good standing in the State of North Dakota.

Section 43-15-35 (5) of the North Dakota Century Code requires that the majority of the corporate stock of a corporate applicant for a pharmacy permit be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

Since the application for a pharmacy permit did not comply with the requirements of Section 43-15-35 (5) of the North Dakota Century Code, the State Pharmacy Board denied the application. The constitutionality of Section 43-15-35 (5) was not before the State Pharmacy Board and therefore no evidence was presented on this question.

An appeal was taken by the respondent to the State District Court, and the question as to the constitutionality of Section 43-15-35 (5) was raised on appeal. The respondent, Snyder's Drug Stores, Inc., then brought a motion for summary judgment, which was granted by the District Court. The State Pharmacy Board, therefore, did not have an opportunity to present evidence relating Section 43-15-35 (5) to the public health, safety, and welfare.

The State Pharmacy Board then appealed the District Court decision to the Supreme Court of North Dakota.

The Supreme Court of North Dakota held that it was bound by the decision of the United States Supreme Court in *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928), wherein a Pennsylvania 100% pharmacist ownership law was declared unconstitutional, and see-

ing insufficient basis for distinguishing that decision from the instant case, it sustained the trial court's conclusion that Section 43-15-35 (5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The argument of the petitioner can be summarized as follows:

(1) That there has been a change in the doctrine of the United States Supreme Court since the 1928 *Liggett* v. *Baldridge* decision; and the Supreme Court now does not judge the wisdom, need, merits, or reasonableness of state laws in determining whether a state law meets the requirements of the Fourteenth Amendment to the United States Constitution.

(2) That the United States Supreme Court and various state supreme courts have recognized this change of doctrine, and the state court decisions have noted that the *Liggett* v. *Baldridge* decision has been seriously limited if not completely undermined.

(3) That the Supreme Court of North Dakota did err in relying on *Liggett* v. *Baldridge* and being bound thereby.

(4) That the North Dakota statute in question is properly related to the public health, welfare, and safety.

(5) That the ownership or control restriction on non-professionals is constitutional in other professions such as dentistry and optometry and the same should be true in the profession of pharmacy.

ARGUMENT

Change in Doctrine of United States Supreme Court

There has been a change in philosophy and attitude of the United States Supreme Court since the *Liggett* v. *Baldridge*, 278 U.S. 105 (1928) decision upon which the North Dakota Supreme Court based its decision.

As originally construed, the due process clause of the Fourteenth Amendment was viewed as a guaranty of procedural protection rather than bringing to the test of the decision of the United States Supreme Court, the "merits" of the legislation. *Davidson* v. *New Orleans*, 97 U.S. 97, 103-104 (1878); *Slaughterhouse Cases*, 16 Wall. 36, 80-81 (1873). Initially, the court refused to reject legislation on constitutional grounds, on other than procedural aspects under the Fourteenth Amendment. Best exemplifying this evaluation is an 1877 case wherein the court upheld a rate-fixing statute of Illinois, recognizing the possibility of abuse, but stated that "for protection against abuses by legislatures, the people must resort to the polls, not to the courts." It also asserted, "For our purposes we must assume that, if a state of facts exist that justify such legislation, it actually did exist when the statute now under consideration was passed." *Munn* v. *Illinois*, 94 U.S. 113, 132, 134 (1877).

About a decade later, the court departed from this emphasis on the procedural aspect and considered the law itself. This attitude of the court found expression in many cases holding state and federal statutes unconstitutional. Examples of such decisions: *Lochner* v. *New York*, 198 U.S. 45 (1905); *Coppage* v. *Kansas*, 236 U.S. 1 (1915); *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Burns Baking Co.* v. *Bryan*, 264 U.S. 504 (1924). This philosophy prevailed when the *Liggett Co.* case was decided by the court in 1928.

Current evidence of the change in emphasis and philosophy is found in *Ferguson* v. *Skrupa*, a case decided in 1963. The court sustained the constitutionality of a state law prohibiting other than lawyers from engaging in the business of debt adjusting or debt-pooling. The language of the court indicates its attitude:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.

"There was a time when the Due Process Clause was used by this court to strike down laws which were thought unreasonable; that is unwise or incompatible with some particular social or economic philosophy. . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis.

"The doctrine that prevailed in the *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold law unconstitutional—when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

"It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

"We conclude that the Kansas legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting.

"We refuse to sit as a 'super-legislature' to weigh the wisdom of legislation . . . and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they are unwise, improvident, or out of harmony with a particular school of thought. . . ."

Ferguson v. *Skrupa*, 372 U.S. 726, 729, 730, 731, 732, 10 L. Ed. 2d 93, 96, 97, 98 (1963). See also *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, *Boddie* v. *Connecticut*, 401 U.S. 371, 384, 28 L. Ed. 2d 113, 123 (separate concurring opinion of Justice Douglas).

The decision in *Daniel* v. *Family Secur. L. Ins. Co.*, (1949) 336 U.S. 220, 93 L. Ed. 632, 69 S. Ct. 550, illustrates the unanimous view of the Supreme Court, announced in *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, (1949) 335 U.S. 525, 536, 537, 93 L. Ed. 212, 221, 227, 69 S. Ct. 251, 6 A.L.R. 2d 473, that the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare, the Court returning closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific Federal constitutional prohibition, or of some valid Federal law.

The *Daniel* case also stated that the court "cannot undertake a search for motive in testing constitutionality," and that the desirability of legislation is not a matter for the courts, but for a responsive legislature. (336 U.S. 224)

In *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-488 (1955), Justice Douglas stated:

> "The (state) . . . law may enact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.
>
> "For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

The United States Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469.

As stated in *Dandridge* v. *Williams*, 397 U.S. 471, 484, 25 L. Ed. 2d 491, 501, 90 S. Ct. 1153:

> "For this court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought;' "

citing *Williamson* v. *Lee Optical* and *Ferguson* v. *Skrupa*:

> "If laws are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the requirements of due process are satisfied. With the wisdom of the policy, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."

Nebbia v. *New York*, 291 U.S. 502, 531 (1934). See also *Olsen* v. *Nebraska*, 313 U.S. 236, 241 (1941); *Daniel* v. *Family Ins. Co.*, 336 U.S. 220, 222-224 (1949).

We submit that if the *Liggett* v. *Baldridge* case were before the Supreme Court now, that under the doctrine now applied in regard to the due process clause, a different result would be reached.

If the North Dakota legislature determined that registered pharmacists should control the management and operation of pharmacies to protect the public health, safety, and welfare, we do not believe that under the present doctrine of the Supreme Court that the decision of the state legislature would be held to be unwise, unreasonable, or unconstitutional.

Reliance by North Dakota Supreme Court on Liggett v. Baldridge Is Not Proper

The North Dakota Supreme Court relied entirely on the United States Supreme Court case of *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928) and stated at page 30 of the Petition for Writ of Certiorari, and at 202 N. W. 2d, as follows;

> "Being bound by the decision of the United States Supreme Court in *Baldridge*, and seeing insufficient basis for distinguishing that decision from the instant case, we sustain the trial court's conclusion that Section 43-15-35 (5), N.D.C.C., violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution."

The *Liggett* case involved a Pennsylvania statute which required that registered pharmacists own 100% of the stock of any corporation owning a drug store or having a pharmacy permit.

The North Dakota statute under consideration here requires that only a majority of the stock be owned by registered pharmacists, and also requires that the pharmacist owner be actively engaged in and responsible for the operation, management and supervision of the pharmacy. The North Dakota statute is concerned with the control of the management supervision, and operation of the pharmacy as opposed to mere ownership.

The basic issue under the North Dakota statute is not one of ownership, but rather of control of the supervision and management of the pharmacy.

The *Liggett* v. *Baldridge* United States Supreme Court case the North Dakota Supreme Court felt bound by has been discounted, seriously limited, perhaps completely un-

dermined, and not followed by courts in California, Maryland, Michigan, and by the United States Supreme Court itself.

The California case of *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256, at page 263, stated that there can be no doubt that the rule (in *Liggett* v. *Baldridge*) is now different, quoting with approval from the Maryland case of *Brooks* v. *State Board of Funeral Dir. & Embalm.*, 195 A. 2d 728, 735 (1963), where it states: "It (the *Liggett* case) has been seriously limited, if not completely undermined."

In the Maryland case of *Brooks* v. *State Board of Funeral Dir. & Embalm.*, 195 A. 2d 728 at page 735, it states as follows:

> "The Liggett case has never been expressly overruled, but it has been seriously limited, if not completely undermined. See *Daniel* v. *Family Security Life Ins. Co.*, 336 U.S. 220, 69 S. Ct. 550, 93 L. Ed. 632, in which the Supreme Court sustained a state statute forbidding undertakers to serve as agents for life insurance companies. In commenting on *Liggett*, the United States Supreme Court said (336 U.S. at pages 224-225, 69 S. Ct. at page 553, 93 L. Ed. 632):
>
> > 'We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop. This rationale did not find expression in *Liggett Co.* v. *Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204, on which respondents rely. According to the majority in *Liggett*, "a state cannot" under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations

or impose unreasonable and unnecessary restrictions upon them.'

"278 U.S. at page 113, 49 S. Ct. at page 59, 73 L. Ed. 204. But a pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union No. 19129, A. F. of L.* v. *Northwestern Iron and Metal Co.*, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed 212, where the cases are reviewed."

The *Brooks* case at page 735 also stated that "the sweep of the *Liggett* case was already limited by the action of the Supreme Court in *Markmann Funeral Home, Inc.* v. *Ryan*, 300 U.S. 639, 57 S. Ct. 510, 81 L. Ed. 855."

It should be noted that the Supreme Court of Michigan, after many hearings and after extensive argument before their Supreme Court on three different occasions, in the case of *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, reported at 146 N. W. 2d 1, 134 N. W. 2d 678, 132 N. W. 2d 328, and 125 N. W. 2d 13, has not by a majority decision of its Court, held a 25% ownership requirement by a registered pharmacist to be an unconstitutional requirement, and apparently did not feel bound by the *Liggett* v. *Baldridge* case.

We submit that *Liggett* v. *Baldridge* has been discounted and seriously limited and was not proper authority for the North Dakota Supreme Court to base its decision on.

Statute Related to Public Health, Safety, and Welfare

Since the operation of a pharmacy embraces the acquisition, compounding and dispensing of dangerous drugs, poisons and narcotics, the relationship of such operation to public health is clearly indisputable.

The question of whether the enactment of Section 43-15-35 (5) of the North Dakota Century Code was a proper exercise of the police power, and related to the public health, welfare, and safety, was not properly before the North Dakota Supreme Court. This issue was not before the administrative agency, and upon appeal to the State District Court the case was decided upon a motion for summary judgment without the opportunity to present evidence on the relationship of the statute to the public health, safety and welfare.

We would submit the following as some of the reasons this ownership and control restriction is related to the public health, safety and welfare:

(1) The professional and ethical standards of pharmacy demand the pharmacists's concern for the quantity and quality of stock and equipment. A drug which has deteriorated because of improper storage facilities can be a detriment to public welfare. The drug not in stock poses a threat to the individual who needs it now. The owner of a pharmacy or those in control of a pharmacy are very influential in determining what, when and where stock and equipment are purchased, and these decisions could be detrimental to the public health and welfare.

Since the hired pharmacist is dependent upon his supervisors to furnish the tools and ingredients to

assure the highest measure of quality and pharmaceutical service to the public, the presence of trained, licensed pharmacists in supervisory and managerial positions, with a full sense of accountability as a professional man, will further assure the public of proper pharmaceutical service in the best interests of public health and safety.

(2) One of the problems of adequate public protection in pharmacy operation is the placement of responsibility for improper action. The unlicensed owner or corporation official will disclaim responsibility by claiming the fault belongs to an incompetent pharmacist he hired, whose inadequacy he was incapable of detecting. The hired pharmacist will insist that he was compelled, out of considerations of personal insecurity, to yield to unlawful directions of untrained superiors. When licensed pharmacists are involved in the ownership or management of pharmacies, accountability for non-observance of lawful requirements would be definitive. Section 43-15-35 (5) NDCC would ease the task of enforcement agencies in the detection, elimination and accountability for unethical conduct. In fact, the greater accountability recognized by licensed practitioners would be an effective deterrent to improper practices which expose the public to serious injury.

Essentially, pharmacists find themselves in a somewhat unique position in comparison with other professions in that, while they are rendering a specialized professional service requiring the highest degree of skill, knowledge and integrity, they also are involved in a commercial venture, whose area has been invaded by non-pro-

fessionals whose only aim is to profit from the profession of pharmacy. The operation of pharmacies by non-licensed individuals has converted the policy of the pharmacy in some cases to a commercial enterprise, minimizing the importance of the standards of the profession and the protection of the public. These pressures tend to demoralize a professional undertaking by subjugating the professional standards to destructive commercial influences, and the ultimate detrimental effect on the health, welfare, and safety of the public caused by lack of proper safeguards and standards so closely associated with the maintenance of the standards of the profession of pharmacy.

With the advance of modern discoveries of miracle drugs, and the drug problems present in the United States, it is now more than ever important that the practice of pharmacy be free from commercialism; and that the purchase and sale of such drugs to the public be controlled, managed and initiated by owners, or those in control of the operation, who are themselves registered and qualified; and who will take individual pride in their profession as pharmacists, rather than in the making of extra profits such business may afford a non-professional owner of such pharmacy.

(3) The dignity of a profession and the morale and proficiency of those licensed to engage therein is enhanced by prohibiting the practitioner from subordinating himself to the direction of untrained supervisors. There are comparable statutory requirements pertaining to the practice of

other licensed professions, such as accounting, architecture, law, engineering, and the health field of medicine, dentistry, etc.

(4) It is recognized that not all licensed practitioners are possessed of the same measure of proficiency in their profession. Lay management, being untrained, cannot detect such deficiencies, either in the employment of licensed pharmacists or in the actual practice of the profession. Section 43-15-35 (5) NDCC will tend to assure a higher standard of competence in pharmacist-employees, it being recognized that the non-professional owner of necessity must hire licensed pharmacists to carry on the practice of pharmacy. The public is entitled to and is dependent on such protection to the extent that licensed pharmacists have the requisite skill and competence. Therefore, the requirement that the owner, partners, or corporate officers and directors responsible for and supervising the pharmacy be themselves licensed pharmacists, would assure the public of increased protection through the insistence of greater professional capabilities on the part of managerial supervisors. The legislature is taking an additional precaution to prevent abuse of the public safety.

(5) The divorce between professional knowledge and attainment and lay managerial control is an evil, and the public should not be exposed to such evil. Where control and management are vested in laymen unacquainted with pharmaceutical service, and who are untrained and unlicensed, the risk is evident that social accountability will be subordinated to the profit motive with dire con-

sequences to the profession of pharmacy. The purpose of this legislation is to enhance protection afforded the public by balancing the profit motive and the professional obligations of service and responsibility.

(6) The pharmacy of a drug store was never intended to be a mere device for developing customer traffic for a business enterprise. A pharmacy was intended to be more than just a prescription laboratory within a jungle of commercial departments. The term "pharmacy" was intended to identify a particular type of establishment within which a health profession is practiced. Under some present laws which permit purely commercial interests to wholly own or control pharmacies, the policies, practices and conduct of pharmacies are frequently unduly influenced by such commercial interests. The basic truth is the person who holds the purse strings is the person who controls policy.

(7) Restricting physician-owned and controlled pharmacies where there could be a serious conflict of interest. See *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256. At page 260 of the *Magan* opinion in footnote 1, some of the testimony offered regarding the evils of physician ownership of pharmacies is set forth. See also *Hearings on Physician Ownership in Pharmacies and Drug Companies before a Subcommittee of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 175-77 (1964). See also *Hart Bill*, S. 2568, 89th Cong., 1st Sess. (1965).

In the *Liggett* case, the lower Federal District Court held that the statute in question was constitutional, and stated as follows:

"We are unable to say that there is not a substantial relation of ownership to the public interest. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated, not by the judgment of the pharmacist, who hands it out to customers, but by those who have the financial control of the business. It may be the Legislature's thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and if such was the thought of the Legislature, can this Court say it was without a valid connection with the public interest, and so unreasonable as to be unlawful?

"There enters into every business the two motives of a wish for profit and a sense of duty obligation towards those with whom the management deals. When these are joined, the latter operates to some extent; the moment they are separated, the former is in sole control.

"Because of our inability to make the finding that the instant act of the assembly has no substantial relation to the public interest, we cannot hold it to be unconstitutional. What opinion may be entertained of the wisdom of much of the legislation of this general character, and of the motives of those who have prompted it, the courts are not called upon to express."

Liggett Co. v. *Baldridge*, 22 F. 2d 993, at page 996.

In *Liggett Co.* v. *Baldridge*, 278 U.S. 105, Mr. Justice Holmes in his dissent stated:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed to be necessary in order to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed. Of course, notwithstanding the requirement that in corporations hereafter formed all the stockholders shall be licensed pharmacists, it still would be possible for a stockholder to content himself with drawing dividends and to take no hand in the company's affairs. But obviously he would be more likely to observe the business with an intelligent eye than a casual investor who looked only to the standing of the stock in the market. The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less. I think, however, that the police power as that term has been defined and explained clearly extends to a law like this, whatever I may think of its wisdom, and that the degree should be affirmed." (*Note*: The dissent was joined in by Mr. Justice Brandeis.)

In the Michigan case of *Superx Drugs Corp.* v. *Michigan Board of Pharmacy*, 146 N. W. 2d 1 at page 4, Justice Deltmers stated:

"There is testimony of eminent pharmacologists, teachers and practitioners in the field, that in their opinion there is a reasonable relationship between the statute's stock ownership requirements and public health and safety. They also testified as to their reasons for their opinions. It is true that there also is testimony in the record to the contrary. As this Court said, however, in *Grocers Dairy Company* v. *Department of Agriculture Director*, 138 N. W. 2d 767:

> The presumption of the constitutionality of a statute favors validity, and, if the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted."

We submit that the North Dakota pharmacist control statute is properly related to the public health, safety and welfare, and is a proper exercise of the police power.

Prohibition on Physician Ownership of Pharmacies

One of the reasons for the enactment of Section 43-15-35 (5) of the North Dakota Century Code was to prevent physician ownership of pharmacies.

California, Maryland and Pennsylvania have statutes relating to physician ownership of pharmacies.

The California enactment prohibits the pharmacy board from issuing new pharmacy permits to physicians and requires all physicians to rid themselves of any "membership, proprietary interest, or co-ownership" by June 1, 1967. Cal. Bus. & Prof. Code, Sec. 654. See *Magan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256, wherein the California statute was upheld as constitutional.

Both the Pennsylvania and the Maryland regulations in essence empower the state boards of pharmacy to suspend or revoke the license of a pharmacist for association as an employee, co-owner, or partner in any pharmacy in which a medical practitioner has an interest, and declare such association to be unprofessional conduct. Pa. Stat. Ann., Tit. 63, Sec. 390-5 (9) (xii) (Supp. 1964); Md. Ann. Code Art. 43, Sec. 266A (c) (4) (iii) (Supp. 1964).

The California, Maryland and Pennsylvania provisions can only be interpreted as an implicit recognition of the evils inherent in the physician-owned pharmacy, and represent an attempt on the part of those states to remedy the problem *Physician Ownership of Pharmacies,* 141 Notre Dame Lawyer 49, 62 (1965).

North Dakota, through the statute in question, has accomplished the same objective. The courts should not be allowed to say that this law is unconstitutional, because there is a better or different way this objective could have been accomplished.

Should the Profession of Pharmacy Be Treated Differently from Other Professions?

On the authority of statutes and court decisions, pharmacy has been declared to be a profession. California-West's Ann. Bus. & Prof. Code, Sec. 4046; Louisiana—LSA-R.S. 37, 1222; Nevada—Nev. Rev. Stats., Sec. 639.213; Pennsylvania—63 P. S. Sec. 390-2 (11); *Lee* v. *Goddy,* 183 So. 4, 6 (Fla. 1938); *Sashihara* v. *State Bd. of Pharmacy,* 46 P. 2d 804, 805 (Calif. 1935).

In *Liggett,* however, the Supreme Court viewed the practice of pharmacy as more of a trade or occupation, rather than a profession. See *Physician Ownership in Pharmacies,* 141 Notre Dame Lawyer 49, 60.

Similar ownership or control requirements have been sustained in other professions such as optometry and dentistry. Why should the profession of pharmacy be treated any differently?

In *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1954), the United States Supreme Court upheld the validity of a state law which prohibited unregistered optometrists from becoming employees of unregistered individuals or corporations. Stress in such cases has been placed by the courts on the necessity for unfettered professional activity in dealing with the needs of a patient.

A Washington statute held to be a reasonable exercise of the police power in *State* v. *Boren*, 219 P. 2d 566 (1950) appeal dismissed 340 U.S. 881 (1950) prohibited the practice of dentistry without a license; and provided that a person practices dentistry who owns, maintains or operates an office for the practice of dentistry. The *State* v. *Boren* case overruled *State* v. *Brown*, 79 P. 635 (Wash. 1905) which concluded that the health, moral, or physical welfare of the public is not endangered by the ownership and management of a dental office, so long as the actual dental work is done by those qualified and licensed by law.

In overruling *State* v. *Brown*, the Washington court declared in the *Boren* case, that it agreed with the general statement made in the *Brown* case that "to own and manage property is a natural right," but that there was a clear distinction between the right of the state to interfere with the owning and managing of property as such, and its right under its police power to protect the health of its people. The care and treatment of the teeth requires a personal relationship between dentist and patient, and the services of a trained expert. Dentistry is not a

business or a commercial transaction, but is a profession, the regulation of which is a duty of the state. The state has decided that the statutory regulation considered here is necessary to protect the health of the people. Clearly, such a regulation is a reasonable exercise of its police power.

State ex rel. Standard Optical Co. v. *Superior Court*, 135 P. 2d 839 (Wash. 1943), was a quo warranto proceeding charging the defendant corporation with unlawfully practicing optometry. The corporation operated a store which was in the sole charge of a licensed optometrist employed and paid by the corporation. The corporation exercised no control over the optometrists' professional judgment. The court, in holding that the course of business followed by the corporation constituted the unlawful practice of optometry, stated that if such a course were sanctioned, corporations might practice law, medicine, dentistry, or any other profession by the simple expedient of employing licensed agents. If this were permitted, professional standards could be destroyed, and professions requiring special training would be commercialized to the public detriment.

In *State* v. *Williams*, 5 N. E. 2d 961 (Ind. 1937), a statute declaring that one who owned, operated, managed or conducted a dental office was engaged in the practice of dentistry, was held to be within the police power of the state. The court declared that if a person or association of persons unqualified to become licensed as dentists can own, manage and operate a dental office with a licensed dentist in charge, that all the statutes regulating the practice of dentistry would be of no effect. The standards and ethics of the dental office, the class of workmanship and the price would be regulated by the owner. If the owner could select and rent the office and employ the licensed dentist to do the actual work, he

would be doing a dental business, and would be doing indirectly what he could not do directly.

In a California case, *Parker* v. *Board of Dental Examiners,* 14 P. 2d 67 (1932), involving similar regulations, the appellant contended there was a distinction between the practice of dentistry which the statute undertook to regulate and the purely business side of the practice. The court held that to make such a distinction was impractical. To hold otherwise would allow the proprietor of the business to be guilty of such misconduct as to violate standards which a licensed dentist is required to respect and allow him immunity from regulatory supervision. His employee, the licensed dentist, would also be immune upon the grounds that he was a mere employee, and not responsible for his employer's acts. The right of a person merely to own a dental office not being involved, the question was whether the thing owned was used for an intended purpose by a person lawfully licensed to so use it. An unlicensed owner would possibly have less regard for the employee's skill than would a licensed owner charged with the obligation he assumes with respect to the standards of his profession.

In *Messner* v. *Board of Dental Examiners,* 262 P. 58, 60 (1927), the court stated:

> "The power to hire and discharge and to fix the compensation of an employee necessarily implies the power to control his work."

The state regulation of the practice of optometry is discussed in *Physician Ownership of Pharmacies,* 141 Notre Dame Lawyer 49, 63, wherein it is stated as follows:

> "The relationship between an optometrist and the optician on the one hand, and the physician and the pharmacist on the other hand, is quite similar. Both

the optometrist and the physician prescribe devices or medicines as treatment for the ills which they diagnose. These devices or medicines are ordinarily furnished by third parties.

There is a split of opinion among the states as to whether a corporation or a non-optometrist may be allowed to hire an optometrist and sell his services to the public. See cases collected in Annot., 128 A.L.R. 585 (1940) . . . . Many of these states follow the *Liggett* rationale in holding that the identity of the employer of an optometrist can have no relation to the public health, safety, and welfare. In other states, statutes prohibiting a registered optometrist from becoming the servant of unregistered individuals or corporations have been held constitutional. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1954); *Kay Jewelry* v. *Board of Registration in Optometry*, 27 N. E. 2d 1 (Mass. 1940); *McMurdo* v. *Getter*, 10 N. E. 2d 139 (Mass. 1937). Courts in these states have held that such an arrangement permits the unlicensed party to exercise control over the professional activities of the licensed party, and that the separation of control and professional knowledge is an evil which is detrimental to the public interest. *McMurdo* v. *Getter*, supra at 142; *Ezell* v. *Ritholz*, 198 S. E. 419 (S. C. 1938).

As the Supreme Court of South Carolina said in *Ezell* v. *Ritholz*, 198 S. E. 419, 424 (S. C. 1938):

> The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests

in the very nature of the case are commercial in character.

In holding that the state of Pennsylvania could prohibit a corporation from practicing optometry through hired licensed optometrists, the Supreme Court of Pennsylvania, in *Neill* v. *Gimbel Bros.*, 199 Atl. 178, 182 (1938), stated:

> One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise affected by the prescriptions of the employee-practitioner.

In short, these courts have realized that when a professional practitioner such as an optometrist is subjected to the control of an unprofessional employer, and is dependent upon him for compensation, it is possible that 'the welfare of the patient would not be the sole criterion applied by the optometrist in rendering services to him.' *Lieberman* v. *Conn. St. Bd. of Examiners in Optometry*, 34 A. 2d 213 (Conn. 1943)."

Under the Professional Corporation Act of the State of North Dakota, Section 10-31-07, a professional corporation may issue the shares of its capital stock only to persons who are duly licensed to render the same specific professional services as those for which the corporation was organized. This act requires one hundred per cent ownership, as opposed to the pharmacy requirement of majority ownership. If such a requirement is constitutional for a professional corporation, why should it be any different for a corporation operating a pharmacy?

Portions of the above authorities are cited in a North Dakota Law Review note at 39 North Dakota Law Review 447, entitled, "Is the North Dakota Statutory Requirement that Pharmacies Be Owned by Registered Pharmacists a Valid Exercise of Police Power?" wherein it is submitted that the effect a non-pharmacist owner can have in the practice of pharmacy would be detrimental to the public health and welfare, and is extensive enough to require regulation.

If the ownership or control restriction is constitutional and determined to be related to the public health, welfare, and safety in other professions, we submit that the same is true in respect to the profession of pharmacy.

CONCLUSION

We ask that the United States Supreme Court in this case reverse or modify the *Liggett* v. *Baldridge* decision and the decision of the North Dakota Supreme Court to conform with later decisions and the prevailing doctrine of the United States Supreme Court on this constitutional question.

Respectfully submitted,

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